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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. DANIEL CHRISTOPHER CEBADA, Defendant and Appellant.	G045059 (Super. Ct. No. FVIVS011525) O P I N I O N

Appeal from a judgment of the Superior Court of San Bernardino County, Katrina West, Judge. Reversed and remanded.

Rudy Kraft for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, William M. Wood and Bradley A. Weinreb, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

The trial court erred in excluding a written "Release Plan" prepared by appellant Daniel Christopher Cebada (Cebada) in anticipation of being released from a state mental hospital. The release plan was not hearsay. It was offered to show a number of aspects of Cebada's mental state, including that he had thought through, and grappled with, the logistical and psychological problems he would face upon any release from a mental hospital. It also showed the self-awareness he had gained from spending the previous decade in mental hospitals. The document was directly relevant on the issue of the probability of his reoffending. (See Evid. Code, § 1250 [evidence of plan not hearsay]; *People v. Ortiz* (1995) 38 Cal.App.4th 377, 389 [evidence of state of mind not hearsay].)

We have reviewed, on our own, the entire record in this case to determine whether the evidentiary error was prejudicial. Three factors persuade us that the exclusion was indeed prejudicial under the reasonable probability standard laid down in *People v. Watson* (1956) 46 Cal.2d 818 (*Watson*).

First, in his *rebuttal* argument to the jury – that is, after the defense counsel had given his argument and had no opportunity to address the jury or present more evidence – the prosecutor went to great lengths to denigrate Cebada's written release plan, arguing Cebada could not "apply" it in his life if he were released from mental hospitals. The prosecutor's own conduct thus undercuts the Attorney General's argument that the written release plan was only cumulative evidence on top of the oral testimony about the plan. Second, in its deliberations, the jury specifically requested a copy of the written release plan, but was denied it based on the prosecutor's hearsay objection. Third, the evidence in this proceeding was in equal balance as to whether Cebada really fits within the category of a sexually violent predator (SVP) at all. (See *People v. Mar* (2002) 28 Cal.4th 1201, 1225 (*Mar*) [finding error prejudicial under *Watson* standard where evidence was in equal balance].) There is a reasonable probability that erroneous exclusion of the written release plan from the jury affected their determination.

Following our Supreme Court in *Mar*, and our colleagues in Division One of this district in *People v. Munoz* (2005) 129 Cal.App.4th 421, 432 (*Munoz*) [evidentiary error in SVP proceeding held prejudicial under *Watson* in light of "manner" of prosecution's case], we therefore reverse and remand for a new trial.

Because our disposition of this appeal entails a new trial, we also examine Cebada's other claims of error. (Code Civ. Proc. § 43 [necessity of addressing appellate issues required for retrial].) Other than the exclusion of the written release plan no error is shown.

However, one big, though surely inadvertent, mistake in both the appellant's opening brief and the Attorney General's brief must be recognized at the outset. Both briefs say that Cebada was paroled in 2008, during which he violated the conditions of the parole by attending a birthday party for an eight-year-old boy. The record is clear that the parole violation occurred in 1999, not 2008. Since 1999 Cebada has lived continuously in prison or state mental hospitals. If the violation had occurred in 2008, two years before trial, instead of in 1999, 11 years before trial, it is unlikely the evidence as to Cebada's likelihood of reoffending would have been in equal balance.

BACKGROUND

1. Events Leading to Trial

Cebada was born in 1976. His father died in 1988. In 1994, at age 18, his mother moved to Lake Elsinore. Cebada preferred to stay alone in an apartment complex in Apple Valley funded by social security payments he was receiving from the death of his father. During a four-month period in the first half of 1994, Cebada molested six children between the ages of 5 and 10, all from the apartment complex. His modus operandi was predatory. He pretended to be a 14 year old and lured the children to his apartment by showing them a pet lizard.

Cebada was charged with 11 counts of molestation. The charges resulted in a plea bargain in which Cebada pled guilty to three counts. He was sentenced to a total of eight years on one count, and six years on the other two, running concurrently. In 1998 Cebada was evaluated by three clinical psychologists for SVP status. Two of the three found he was not an SVP and he was released on parole in November 1998.

One condition of his parole was not to have any contact with children. In late August 1999 a cousin invited him to a birthday party for her son's eighth birthday. Cebada violated that condition by going to the party. During the party he invited a four-year-old child to sit on his lap for a "good portion of time." Several adults at the party, knowing his past, became concerned. When the child got off Cebada's lap the latter was observed to have an erection showing through his trousers.

The 1999 birthday party incident resulted in the revocation of Cebada's parole. In 2000 a hearing was held to determine if there was probable cause to commit Cebada to state mental hospitals as an SVP, which, given the relatively recent parole violation, there was. However, an actual trial as to whether Cebada fell within the classification of an SVP did not take place until 2010. In the interim Cebada lived in state mental hospitals, first at Atascadero (until about 2005) and then at Coalinga where he was residing in 2010. He has had freedom to move about Coalinga.

The pattern during this 10-year time period was that clinical psychologists would evaluate Cebada every two years or so, determine he fit within the category of an SVP, and any pending trial would be continued. As stated in *Cooley v. Superior Court* (2002) 29 Cal.4th 228, 236, there are four elements necessary to be adjudicated an SVP: "(1) the offender has been convicted of a qualifying sexually violent offense against at least two victims; (2) the offender has a diagnosable mental disorder; (3) the disorder makes it likely he or she will engage in sexually violent criminal conduct if released; and (4) this sexually violent criminal conduct will be predatory in nature." The psychologists concluded during this period that Cebada met the criteria for being an SVP.

But the pattern was broken in 2007 when Dr. Shoba Sreenivasan, who had evaluated Cebada since 1998, determined he did *not* at that time present a *risk* of reoffending. In 2008, another psychologist, Dr. Mary Alumbaugh, was called in to give an independent evaluation. Dr. Alumbaugh concurred with Dr. Sreenivasan. The other independent psychologist, Dr. Harry Goldberg, disagreed with Drs. Sreenivasan and Alumbaugh. The stage was thus set for Cebada's 2010 trial where both Dr. Alumbaugh and Dr. Sreenivasan testify that Cebada does not fit within the definition of an SVP, while Dr. Goldberg and Dr. Richard Romanoff testified he does.

2. Overview of Trial and Exclusion of the Written Release Plan

Trial consisted of these experts for each side: Dr. Goldberg and Dr. Romanoff for the prosecution, Dr. Sreenivasan and Dr. Alumbaugh for the defense. Trial also included the testimony of a Canadian professor of clinical psychology, Dr. Richard Wollert, who testified on Cebeda's behalf and challenged a number of commonly held assumptions about pedophilia. Cebada himself was called to testify on behalf of both the prosecution and in his own defense. Cebada's cousin was also called at the very end of trial as a rebuttal witness to go over (at great length) the discomfort which the adults felt at Cebada's behavior during the 1999 birthday party, and to remove any doubt that Cebada's own testimony might have created over whether he had actually invited a child to sit on his lap and had been seen to have an erection when the child left.

Sometime around June 2010, a few months before trial began in August, Cebada prepared a written "Release Plan." The written plan consisted of five pages, with text under bold headings, with some headings having bold text subdivisions. The headings are Introduction, Immediate Release, Housing, Employment, Financial and Support Services, Education, Support Group, Recreation, Accountability, and Conclusion. Housing, Employment, Financial and Support Services, and Education are subdivided into Immediate, Short Term and Long Term categories. Much of the plan

consists of statements of intention, e.g., under Immediate Release, Cebada stated: "I will immediately register (or make an appointment to register, if needed) as a sex offender at the nearest police or sheriff's station as appropriate to fulfill my PC 290 registration requirement." But much of it also consists of statements of self-realization.

The introduction, for example, presents entirely a statement of self-awareness. "I recognize that, as a consequence of my actions in the crimes I committed, I am expected to maintain a higher level of accountability and responsibility when I reenter society. To that end, I have developed this release plan in order to detail the steps I will take to maintain accountability and facilitate my reentry into society as a productive and responsible citizen."

Under Housing, there is this similar introductory statement. "In order to fulfill my legal obligations and the expectations of society, I will be aware of and comply with any and all housing restrictions in effect anywhere I obtain a residence."

Under Support Group, Cebada stated: "I recognize that maintaining a positive support group that is active in my daily life is important in maintaining healthy personal relationships, assisting the unforeseen difficulties and maintaining accountability. Therefore, I will cultivate a support group that will include the following . . . ."

Cebada then elaborated on a specific church group in Seattle and having access to counseling at that group. Under Accountability, he stated: "More than anything else, accountability is necessary in my new life. This not only protects society but also myself. By following the steps outlined below, I will be assured of leading [*sic*] a safe, productive citizen of the Seattle community. I will remain accountable for my behavior and daily life by means that include the following," and then follows a number of bullet points for such things as following all registration and residency laws, owning a cell phone with GPS tracking, and keeping a journal of his daily activities.

Cebada appended to his written release plan a proposed monthly budget, allocating, for example, $550 a month for housing and $100 for use of public transportation. The appendix included a heading for Contact Information, listing not only the church group with which he hoped to liaise, but also a counseling center and the downtown emergency services center.

The release plan, marked as Exhibit F, was excluded in proceedings outside the presence of the jury just after the prosecutor had finished his initial closing argument, but before Cebada's lawyer gave his closing argument.

Neither the prosecutor in his initial closing argument, nor Cebada's defense counsel in his closing argument, gave the written release plan much prominence. But in his rebuttal to the defense's closing, the prosecutor laid great stress on the inadequacy of the written release plan. The prosecutor's "rebuttal" to the defense's closing, in fact, went on so long that Cebada's defense counsel felt constrained at one point that to object that it was not really "rebuttal," it was a closing argument given at a stage in the trial where the defense could not respond. The record bears out Cebada's defense counsel's observation. The prosecutor's "rebuttal" (in terms of just pages of transcript) was about 50 percent longer than his initial closing (27 pages versus 39 pages) and about a fourth longer than the defense's own closing argument.

The prosecutor argued that Cebada could not implement the plan in real life: "You can write anything down especially if it sounds good, and you think it looks good for you. But do you know it? Can you practice it? Can you actually do it?" He then reiterated the theme of Cebada's not being able to "apply" the plan to his life and even reminded the jury that they did not know what was in the plan: "A written release plan might have good ideas, but it means absolutely nothing if you don't know what's in that release plan, or you're not able to apply that release plan to your life."

The prosecutor likewise stressed Dr. Romanoff's testimony that "the release plan was inadequate because of what it did not contain" and "the release plan was

inadequate because of what it was missing." He further attacked the church with which Cebada intended to join upon his release, extrapolating from testimony that it had a prison ministry and would take people other churches would not accept, that it worked "extensively [with] sex offenders." The prosecutor also emphasized in his rebuttal the problems of "[b]eing out in the community" and convincing employers to offer him a job, and how isolation and loneliness had led to his original offense. He said: "Being out in the community where you have to go and get a job and convince somebody that you deserve that job, that you can perform the job to the level they need you to be there, and then keep that job, it's a much different situation [than being in a state mental hospital]." The prosecutor followed that thought up by asserting Cebada's loss of the job he had in 1999 led to the parole violation of attending the birthday party.

The prosecutor went on to denigrate the release plan because it *lacked* a provision for contact with Cebada's own family given his proposal to live in Seattle. "He says family is still important to him. But what's he doing? He's running away from the family. Now, it is not Mr. Cebada's fault, at least directly, that he has lost touch with his brother and his mother. But you really got to wonder how important family is if you're going to [run away] a place where there is no family. And what? Start a new family? Or are you going to be content to be left alone, isolated, and lonely until the point where instead of being on the wane, your mental disorder begins to wax." And the prosecutor attacked the lack of a provision in the release plan for sex offender treatment.

The jury made a written request for a number of items of testimony and evidence, including "Court Exhibit: Daniel Cebada's release plan." The jury also asked for both days of Cebada's testimony, Dr. Alumbaugh's testimony, the "[t]estimony of the coping and release plan" given by Drs. Romanoff and Sreenivasan, and this question: "When released from the mental [h]ospital will Daniel be on [p]arole?"

DISCUSSION

1. The Release Plan was not Hearsay

The Attorney General argues that the "true purpose" of the release plan "was to establish the veracity" of Cebada's own trial testimony about what he intended to do upon his release from California mental hospitals. That is, the Attorney General tries to confine the significance of Cebada's written release plan to merely trying to show what he intended to do upon release, and therefore establish the "truth of the assertions within the document."

Not so. While the release plan certainly coincided with Cebada's own intentions to establish himself in Seattle after release and in that sense would merely corroborate Cebada's own testimony about his intentions, the plan had an important, *independent* significance: Its *very preparation* showed that Cebada, having lived in a state mental hospital for over a decade, had gained considerable insight about the external triggers, such as loneliness and isolation, which might tempt him to reoffend, had anticipated those triggers, and had developed a strategy to avoid them. The plan was important because it showed Cebada's mental state included an attention to the logistical details of relocation, obtaining employment, and avoiding contact with children while avoiding loneliness and isolation. In evaluating the probability of any reoffense, these ideas would be applicable regardless of wherever Cebada relocated.

Since the plan went to Cebada's state of mind, it was not "hearsay" for which there is an exception. It was not hearsay at all. As the court in *Ortiz* explained: "In contrast, a statement which does not directly declare a mental state, *but is merely circumstantial evidence of that state of mind, is not hearsay*. It is not received for the truth of the matter stated, but rather *whether the statement is true or not, the fact such statement was made is relevant to a determination of the declarant's state of mind*. (*Ortiz, supra*, 38 Cal.App.4th at p. 389, italics added.)

2. The Exclusion was Prejudicial

A. The Release Plan was not Cumulative

The Attorney General makes only one argument that any erroneous exclusion of the release plan was error. That argument is that the plan was merely "cumulative" to the testimony presented on the issue.

The Attorney General's argument is defeated by the emphasis the prosecutor put on the release plan in his "rebuttal" to the jury, an emphasis that came *after* the prosecutor had successfully blocked the jury from actually seeing the plan itself. Most of the trial consisted of five experts, two for the prosecution, three for the defense. All the experts, as well as Cebada himself, testified about the basic points of the release plan, i.e., the move to Seattle, contact with the church, the intention being to enroll in computer school. But what none of the testimony about the written release plan could convey was precisely what made the plan not hearsay: The information it contained showed Cebada's maturity, self-awareness, and grasp of the logistics of release.

No witness, not even Cebada himself, could have conveyed the information about Cebada's mental state contained in the plan. Some people come across better in print than they do in person. Cebada himself was noted to have been "a little nervous" when he initially took the stand, and the prosecutor himself emphasized the qualities of deliberation inherent in the written word in his rebuttal argument to the jury. It was also particularly unfair for the prosecutor to have stressed the inadequacy of the written release plan *and* what it said about Cebada's own mental state at a point in the trial where the prosecutor knew the jury was not going to see the plan. (See *People v. Lang* (1989) 49 Cal.3d 991, 1034 ["To determine whether the jury may have been misled to defendant's prejudice, we examine the whole record and in particular the arguments of counsel."].)

B. The Evidence Made a Difference to the Jury

Perhaps in light of the prosecutor's great stress on the inadequacy of Cebada's written release plan (plus, as we show below, the relatively evenly divided evidence), during its deliberations the jury specifically requested the written release plan. It also requested a number of items of evidence. The request is an additional factor indicating prejudicial error under *Watson*. (See *People v. Guiton* (1993) 4 Cal.4th 1116, 1130 ["In determining whether there was prejudice [under *Watson*], the entire record should be examined, including the facts and the instructions, the arguments of counsel, any communications from the jury during deliberations, and the entire verdict."]; cf. *People v. Andrade* (2000) 85 Cal.App.4th 579, 588 [instruction error under *Watson* tested by factors that include "any communications from the jury during deliberations"].) The jury clearly wanted to see the written release plan. We cannot say that its erroneous exclusion made no difference.

C. The Evidence was in Equal Balance

The two prosecution experts, Drs. Goldberg and Romanoff, laid great stress on the predatory nature of Cebada's molestations in 1994 and his presence and conduct at the birthday party in 1999. They also criticized Cebada's decision not to enroll himself in formal treatment at the state mental hospitals where he had lived for the previous 10 years. The two prosecution experts also held firm to their diagnosis of pedophilia, and relied primarily on a number of "actuarials," primarily the "Static 99" to predict that Cebada would reoffend.

Actuarials are a series of specific questions or factors designed to predict the recidivism rate of sexual offenders. For the Static 99, there are 10 such factors, including the age of the offender, whether the victims were related or not, and whether the victims were all or mostly male. For the MnSOST-R, there are 16 factors, including employment history, use of force in the offense, and any history of drug or alcohol abuse.

Dr. Sreenivasan compared actuarials to quizzes one might read in the Readers Digest on rating your own risk of a heart attack. Much of the testimony of Dr. Wollert for the defense consisted of an academic critique of the validity of actuarials, based on such things as sampling errors. He testified, for example, that the "SORAG" actuarial is "based on a very bad sample," because it was taken from a group of people in a psychiatric unit in a hospital in Canada who were already there because they had "acted out," including 25 percent of the subjects being there for attempted homicide or homicide, and 18 percent sent there because of a not-guilty-by-reason-of-insanity dispositions. He testified that the MnSOST actuarial was flawed because the sample was based on an "excessive number of recidivisms."

Two of the three defense experts testified that Cebada did not suffer from pedophilia at all, ascribing his earlier offenses to adolescent loneliness and an emotional identification with children. The other, Dr. Sreenivasan, testified that though Cebada did suffer from pedophilia, it was in "remission." But Dr. Sreenivasan also found that Cebada was not the person he used to be. By 2007 he was "a much more mature individual" and "finally emotionally catching up." She noted that by this time he was "emotionally an adult and was able to handle more peer relationships." He had "put into perspective . . . his need for a fantasy family, and the emotional identification with children." In particular she noted that Cebada had been "a very isolated child through most of his life," but contrasted his previous isolation with his involvement in ward government at Coalinga hospital. Instead of being "skitterish and avoidant and anxious around adults," his involvement showed he could be a "leader" among adults. Previously adults had been "scary to him," therefore "he was going towards kids." This condition no longer persisted and he did not pose a risk of reoffending.

Given the strength of the defense case, we cannot say that the erroneous exclusion of the written release plan was harmless under the *Watson* standard. In *Mar*, our Supreme Court held that the possible psychological effect which the defendant's

being erroneously forced to wear a "stun belt" (a device worn under the clothing which, when activated remotely by a court security officer, can deliver a 50,000 volt debilitating shock) was enough to show error under *Watson* because there was "'at least such an equal balance of reasonable probabilities as to leave the court in serious doubt as to whether the error affected the result.'" (*Mar, supra*, 28 Cal.4th at p. 1225, quoting *Watson, supra*, 46 Cal.2d at pp. 836-837.) The error here would seem to have affected the jury's deliberations just as much as the error in *Mar* did. In each case, the error affected the jury's perception of the defendant's character and qualities as a human being.

Similarly, in *Munoz*, an SVP case decided by our colleagues in San Diego, likewise required reversal under *Watson* where the court trial erroneously admitted evidence that on two prior occasions the appellant had been committed as an SVP. The court held that "but for" the errors, and in light of the "contradictory evidence" in the case, it was "reasonably probable" that "a finding more favorable to appellant might have been returned." (*Munoz, supra*, 129 Cal.App.4th at p. 432.) If anything, the error in Cebada's case was more prejudicial than the one in *Munoz.*

3. Other Issues

The case must be returned for a new trial. We therefore address those issues the parties have briefed and which will be required for resolution. (Code Civ. Proc., § 43.)

A. The Padilla "Study"

In 2006, Dr. Jesus Padilla, a psychologist working for the California Department of Mental Health, was ordered by a trial court in Northern California to provide information to a defense attorney in another SVP case concerning individuals released from Atascadero State Hospital *without* having completed sex offender specific treatment. Dr. Padilla's preliminary data were remarkable. Excluding 25 subjects from

the initial sample of 119 because of some unreliability in the information collection (e.g., inability to correlate information from the Megan's Law website with another database), the preliminary study indicated a recidivism rate of less than 5 percent over a period of 4.71 years.

The Padilla study has become something of a *cause célèbre* with the community of lawyers who defend SVP cases, though nothing directly has yet surfaced in a published opinion. (Cf. *People v. Rasmuson* (2006) 145 Cal.App.4th 1487, 1496 [noting criticism by Dr. Harry Goldberg of Dr. Padilla's unpublished study of antiandrogens].) Cebada's opening brief devotes no less than 30 pages to it, admitting that the study was called off by California's Department of Mental Health and at one point even suggesting a dark, "despicable" cover up by the department.

Regardless of the merits of the controversy surrounding the termination of the Padilla study, however, the facts remains that (1) the data were only preliminary, (2) Dr. Padilla never published a formal study analyzing the date, and (3) without a study, there has been no formal peer review or chance to critique either the data or any conclusions that might be drawn from it. It thus does not pass muster under the principles laid down by the United States Supreme Court in *Daubert v. Merrell Dow Pharms.* (1993) 509 U.S. 579. (See *People v. Joehnk* (1995) 35 Cal.App.4th 1488, 1500, fn. 3 ["In deciding if the testimony is scientific, the court looks to many factors, including whether the theory or technique can and has been tested, and whether it has been subjected to peer review . . . ."].) The trial court was thus within the bounds of reason to have precluded the evidence of Dr. Padilla's preliminary findings.

B. Volitional Impairment Instruction

The trial court rejected Cebada's proffered jury instruction to the effect that to find an individual is an SVP, the jury must find he has "seriously difficulty" in controlling his sexually violent behavior. As it was, the trial court did instruct the jury

that Cebada had to have a diagnosed mental disorder which caused him to be "likely [to] engage in sexually violent predatory criminal behavior and that mental disorder affects his "ability to control emotions" and "predispose[s]" him to sexually violent behavior.

Cebada's argument has already been rejected by the California Supreme Court in *People v. Williams* (2003) 31 Cal.4th 757, 782-783 [to the extent a "'serious difficulty' in controlling behavior" instruction is required by federal Supreme Court precedent, "that standard is inherently encompassed and subsumed by the SVPA's definitions of 'sexually violent predator' and 'diagnosed mental disorder'"]. We see no difference between *Williams'* holding that the instruction is not required sua sponte and cases like this one where the trial court refuses it. Either way, there would be no error in the court refusing to give the instruction.

To the degree that *In re Howard N.* (2005) 35 Cal.4th 117, 132 [extended detention scheme for juvenile sexual offenders constitutionally required finding that "the person has serious difficulty controlling his dangerous behavior"] might prompt the California Supreme Court to require a specific "serious difficulty" instruction otherwise not required in *Williams*, Cebada's argument is addressed to the wrong court. Our determination of the issue is a matter of stare decisis. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

C. Equal Protection

Because we return this case for a new trial, the issue of whether California's SVP laws violate constitutional guarantees of equal protection is premature, particularly given that our Supreme Court in *People v. McKee* (2010) 47 Cal.4th 1172, 1208-1209 put the burden on the prosecution to determine whether the People can "demonstrate the constitutional justification for imposing on SVP's a greater burden than is imposed on MDO's and NGI's in order to obtain release from commitment." If necessary, the demonstration can be attempted on retrial.

D. Ex Post Facto, Due Process, and Double Jeopardy

To the degree that that Cebada raises constitutional challenges to California's SVP statutes based on the ex post facto, due process, and double jeopardy clauses of the state and federal constitutions, his challenges have already been rejected in *McKee*. These issues have only raised to preserve any federal remedies that might yet be created for persons adjudged to be SVPs.

DISPOSITION

We reverse the finding that Daniel Christopher Cebada is an SVP and remand for a new trial on that question in accordance with the opinions expressed herein.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

BEDSWORTH, J.

FYBEL, J.